No. 16-35818

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM J. PAATALO

APPELLANT

vs.

U. S. DISTRICT COURT FOR THE DISTRICT OF OREGON

RESPONDENT

APPEAL FROM THE JUDGMENT OF THE US

DISTRICT COURT OREGON

JUDGE ANN AIKEN

CASE NO. 15-cv-01420-AA

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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I.
INTRODUCTION

This appeal is about the final decision and effect of the United States Supreme Court's decision, Jesinoski vs Countrywide Home Loans, 135 S.Ct. 790 (2015)("Jesinoski"). In 2015, the United States Supreme Court decided the matter of Jesinoski vs Countrywide Home Loans, 135 S.Ct. 790 (2015). This decision finally clarified the rescission rights of the parties under the Truth in Lending Act ("TILA") 15 U.S.C 1601. Per Jesinoski, Appellant, Mr. Paatalo, rescinded the loan on his property in Oregon, by sending a letter to the predecessor of Appellee, Washington Mutual Bank, F.A., the original lender. The lender did nothing after receiving the letter, and acquiesced.

Appellee and the lower Court have previously agreed that

Appellant timely rescinded his loan with Washington Mutual Bank, F.A., now succeeded by J.P. Morgan Chase Bank. However, the district court granted defendants' motion for summary judgment, stating that Plaintiff had to show he had a conditional right to rescind the loan under TILA, and that the settlement agreement entered into between the parties was valid. ER 7 This contradicts the ruling in both Jesinoski and Yamamoto vs. Bank of New York, 329 F. 23d. 1167, which held that when the creditor acquiesces or fails to respond within the 20 (twenty) day response period, rescission is accomplished automatically when the consumer has given notice. No such condition is imposed either by statute or by interpretation. The lower court erred in imposing one. This case is simply that direct.

The Appellee provides many inapplicable arguments to obfuscate the issue. Many of their arguments have been put forth in the lower court and denied. The lack of jurisdiction argument is brought here for the first time since 2015. The Appellee itself states in its brief (page 40) that if an argument is made here for the first time it is waived. Taniguchi vs. Schults, 303 F. 3d 950 (9th Circuit 2002). Then applying their argument, the jurisdiction argument is also waived.

The lower court erred in interpreting a settlement agreement between the parties as having effected Appellant's rescission. This is contrary to basic contract law. A contract is voidable if it violates public policy. Bagley v. Mt. Bachelor, Inc., dba Mt. Bachelor Ski and Summer Resort, 2014 Ore. LEXIS 99. To the extent the Settlement Agreement

between the parties is being used to deprive Appellant of his rights under Jesinoski, the agreement is voidable.

However, the District Court upheld the Settlement Agreement ("Release") which could not contemplate Jesinoski, and became contrary to law at its adoption. Thus, the lower court negated Appellant's rescission.

Despite the efforts of Appellee to rewrite history, and spin the facts, this appeal is about the validity and effect of rescission under Jesinoski. The lower court erred in holding the settlement agreement had an effect upon TILA and Jesinoski, when it preempted the settlement agreement rendering it void as to public policy.

II.

ARGUMENT

A. THE PLAIN LANGUAGE OF JESINOSKI

Jesinoski says plainly that "the language leaves no doubt that rescission is effective when the borrower notifies the creditor of his intention to rescind. "The Court also says that there is no condition precedent to rescission at law, and that the act does not imply rescission in equity. 2 D. Dobbs, Law of Remedies § 9.3(3). "The clear import of 1635(a) is that a borrower need only provide written notice to a lender in order to exercise his right to rescind. This is all Appellant was required to do.

To validly exercise the right of rescission, the consumer also is

required to let the creditor know that he or she is rescinding the transaction. 12 C.F.R. §226.23(a)(2). The notice needs to be given "by mail, telegram, or other means of written communication." Id. When the consumer mailed the notice of rescission, even if the creditor didn't honor the rescission within the deadline, the consumer didn't have to take any additional action, such as bringing a lawsuit to enforce the right of rescission. Cocroft v. HSBC Bank USA, N.A., No. 10C3408, 2012 WL 1378645, *4 (N.D. Ill. Apr. 20, 2012)

Once the consumer validly rescinds the transaction, the security interest giving rise to the right of rescission becomes void. 12. C.F.R. § 226.23(d)(1). In addition, the consumer is no longer liable for any amount, including any finance charge. Id.

If the creditor receives the notice of rescission from the consumer, the creditor is required to return "any money or property that has been given to anyone in connection with the transaction," within 20 calendar days after such receipt. 12 C.F.R. § 226.23(d)(2). In addition, the creditor needs to take "any action necessary to reflect the termination of the security interest." 12 C.F.R. § 226.23(d)(2). Note that, while the regulation and § 1635(b) refer to the termination of "security interest," § 1635(a) refers to a "right to rescind the transaction," not just a right to rescind the security interest. Handy v. Anchor Mortg. Corp., 464 F.3d 760, 765 (7th Cir. 2006).

It is patently clear that the Court was aware in 2015 of FIRREA, and did not make any exception to its ruling, as Appellee would argue that rescission once accomplished, still forced the borrower to make a

claim under FIRREA. Jesinoski held that as long as rescission was accomplished by written notice, the borrower did not have to bring a lawsuit before the end of the three-year period. The Supreme Court imposed no other condition upon the notice. It certainly did not impose FIRREA conditions.

B. APPELLANT HAS PROVEN RESCISSION

The lower court found that under Section 1635, once notice of rescission has been provided, the creditor must either begin the unwinding process by returning the borrower's money and taking action to reflect the termination of the security interest, or filing a lawsuit to dispute the Plaintiff's right to rescind. Appellee did neither.

If the Appellee did neither, according to the lower court, within the statute of limitations of TILA, "rescission and voiding of the security interest are effective as a matter of law as of the date of the notice." The burden of filing a lawsuit challenging the rescission is upon the creditor.

Appellee did not challenge the rescission and therefore there was no claim to be made under FIRREA. Any security interest was extinguished.

The lower court denied the argument of the Appellee by denying its motion to dismiss. "Case 6:15-cv-01420-AA Document 12 Filed 11/12/15 Page 18 of 18.

"The timing of Jesinoski is also significant. Although foreclosing trustees and purchasers at trustee's sales have a significant interest in finality, consumers have a countervailing interest in avoiding wrongful foreclosure. Jesinoski revealed the majority of federal courts had "misinterpreted the will of the enacting Congress," Rivers vs. Roadway Express 511 U.S. 298 (1994), in allocating to borrowers the burden to go to court to enforce their statutory rescission rights under TILA. Further factual development is necessary to determine what effect that revelation should have on the property rights of subsequent buyers of the property."

"Defendant's motion to dismiss is denied with leave for defendant to renew its arguments about the effect of the trustee's sale."

CONCLUSION

Defendant's motion to dismiss (doc. 6) is DENIED. Defendant's request for oral argument is DENIED as unnecessary.

IT IS SO ORDERED.

Dated this 12th Day November 2015."

The lower court was aware of the Jesinoski case and "the will of the enacting Congress. " The parties and the Court agreed that the Plaintiff rescinded the loan. Now the Appellee argues before this court that notice was not enough. This defies Jesinoski. The facts have established conclusively that Mr. Paatalo notified the creditor (borrowers must "notify the creditor" of their intention to rescind the

loan within three years) timely. The court found that in the Order ER 2.

The lower court specifically found in ER 2, "Taking the allegations in the complaint as true, if those notices actually rescinded the loan, plaintiff's complaint will survive the motion to dismiss. If, on the other hand, notice of intent to exercise the conditional right of rescission did not actually effect the rescission, defendant is entitled to dismissal. This is error.

The Supreme Court answered this question in Jesinoski. A **unanimous** Court declared "rescission is effected when the borrower notifies the creditor of his intention to rescind." Jesinoski, 135 S. Ct. at 792 (emphasis added).

In the granting of the Defendant's summary judgment motion however, the lower court said something very different. It found:

"To prevail on his claims, plaintiff must show that he had a conditional right to rescind the loan and that he exercised that right within the relevant timeframe." ER 7

This is clearly not what Jesinoski has said. No such condition was imposed by Justice Scalia in this decision. The lower court is simply wrong and erred in placing a condition upon Plaintiff.

Furthermore, the lower court itself agreed with Appellant, about the facts and the law, in its prior order denying the Defendant's Motion to Dismiss. ER 2. It was irrelevant what happened after the rescission, according to the Supreme Court in Jesinoski. The settlement

agreement cannot change the fact of rescission, and it is moot. The court itself stated that Jesinoski was not retroactively applying law, it was simply explaining what the statute meant.

The defendant could not show that it was entitled to judgment as a matter of law, but the Plaintiff could. The Jesinoski case clarified these issues so that Plaintiff rescinded the contract upon notice, and upon the failures of Washington Mutual Bank. There is simply no argument to be made that there is a genuine issue of material fact. Neither WMB or J.P. Morgan Chase contested the rescission, nor did J.P. Morgan Chase counter-claim for its force and effect. It did just as Washington Mutual had done, it acquiesced. Therefore, Jesinoski gave summary judgment to Appellant.

C. THE SETTLEMENT AGREEMENT DID NOT CONTEMPLATE THE RIGHTS OF THE BORROWER IN JESINOSKI AND SUMMARY JUDGMENT WAS ERROR

A release is a contract and is subject to the ordinary rules of contract construction and interpretation. Ristau v. Wescold, Inc., 318 Or. 383, 387, 868 P.2d 1331 (1994). If the terms of the release unambiguously express the intent of the parties, it must be enforced accordingly Inherent in the purpose of a release agreement is a promise to abandon a claim or right that is within the contemplation of the parties. Lindgren v. Berg, 307 Or. 659, 665, 772 P.2d 1336 (1989). Before a release is valid, there must be both the knowledge of the existence of the claim and an intention to relinquish it. At the time

the Appellant signed the Settlement Agreement neither he nor the Appellees had knowledge of Jesinoski nor any intention to relinquish rights attendant to it. Hansen v. Oregon Humane Soc., 142 Or. 104, 115, 18 P.2d 1036 (1933) held that to be valid and binding, a release must be executed with full knowledge of the import of what is being signed and with the intent to discharge from liability.

There was no contemplation of the parties to discharge or relinquish any right the parties were unaware of, specifically the rights of the borrower in Jesinoski. In Patterson vs. Patterson v. American Medical Systems, Inc. 916 P.2d 881 (1996) 141 Or. App. 5, the Court found the same.

"The first paragraph describes the litigation that was pending at the time of the settlement and states that plaintiff and defendant had agreed to settle that litigation and "any and all other claims" that plaintiff "has or might have asserted against" defendant. In a subsequent paragraph, plaintiff states that he accepted the settlement amount in full satisfaction of all claims "of every nature and kind whatsoever, known or unknown, suspected or unsuspected, past, present or future" that were "in any way related" to his "use of any penile prosthetic device manufactured or sold by AMS, which he has or might have asserted against AMS now or in the future."

"It is axiomatic that a release cannot be construed to include claims not within the contemplation of the parties. In the light of the ambiguity in the language of the release and the inferences that can

flow from the surrounding circumstances of the formation of the agreement, we conclude that the trial court erred when it granted summary judgment. As a matter of law, a genuine issue of material fact exists about whether the 1988 release agreement was intended to release a claim for a product that was not used by plaintiff until 1991."

The Appellant nor the Appellee had no contemplation of releasing any claim under Jesinoski. Therefore, the Settlement Release did not and could not apply to Appellant's Jesinoski claim.

III.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's Judgement for Appellee and direct the court to enter judgment for Appellant.

RESPECTFULLY SUBMITTED:
DATED: May 22, 2017

/s/ John A. Cochran
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CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: This brief contains 3070 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief is double spaced and has been prepared in a proportionally spaced typeface using WORD software program, and Century font size 14.

DATED: May 22, 2017

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on Monday, May 23, 2017, I filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that, having obtained prior consent, I have provided a copy of the foregoing to all other parties via electronic mail. *See* FRAP 25(c)(1)(D); Interim Circuit Rule 27-13(c)

I certify that all participants in the case were served by Electronic Filing on May 23, 2107.

DATED: May 23, 2017

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